ORIGINAL

IN THE SUPREME COURT
OF THE
STATE OF ARIZONA

CITY OF TUCSON, a municipal corporation, Appellant, vs. THE ANACONDA COMPANY and AMAX COPPER MINES, INC., partners in the ANAMAX MINING COMPANY; DUVAL CORPORATION and DUVAL SIERRITA CORPORATION, corporations, Appellees.	No. 11439-2 Pima County Superior Court No. 116542

ABSTRACT OF RECORD ON APPEAL
Volume I, pp. 1 - 79

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* * *

(TITLE OF ACTION)

COMPLAINT IN INTERVENTION

Filed: February 28, 1972

The City of Tucson, for its Complaint in Intervention herein, states as follows:

I.

The City of Tucson, hereinafter referred to as Tucson, is a municipal corporation formed in accordance with Arizona statute as a charter city, and has authority to sue as such a charter city.

II.

The lands and waters referred to hereafter are located in Pima County, and the activities of both Tucson on the one hand and all of the defendants in Intervention on the other take place in Pima County.

III.

The defendant Farmers Investment Company, hereafter referred to as FICO, is a corporation in the possession of lands in and near the valley of the Santa Cruz River, which lands are operated by it for agricultural purposes. These lands are located within the general watershed of the Santa Cruz River and within the Sahuarita-Continental Critical Groundwater Area as established by the State Land Department pursuant to Title 45, of Arizona Revised Statutes, Chapter One. These lands have been and are irrigated by groundwater produced by wells operated by FICO which are also within the same Critical Groundwater Area.

IV.

The defendants Anaconda Company, Duval Corporation, American Smeling (sic) & Refining Company and Pima Mining

Company, hereafter referred to collectively as the Mining Companies, are all corporations in possession of lands located to the west of the Santa Cruz River Valley south of Tucson, which lands are used for the mining and milling of copper ore, tailings ponds used in connection with the mining and milling processes, waste disposal areas and other purposes, all of which are related to the production of copper and other metals. Those lands are located within the watershed of the Santa Cruz River. Except for certain well-sites and narrow strips of land connecting some of those well-sites with the principal lands of the Mining Companies, all of those lands, including all of them devoted to mining, milling and processing of ore, are located outside the Sahuarita-Continental Critical Groundwater Area. All of the water produced by the Mining

Companies is used outside that Area.

V.

Tucson has during all of its existence as a city obtained most of the water distributed by its water utility from wells located within the area of the Santa Cruz River and its immediate environs. All of those wells are located within the watershed of the Santa Cruz. Some, but not all, of those wells are located within the Sahuarita-Continental Critical Groundwater Area, such wells having been used, and water from them, transported to the area served by the water utility of Tucson, since 1953. Consumption of water for municipal purposes by the population served by Tucson's water utility requires the production, transportation and use of the water now obtained from wells within the Sahuarita-Continental Critical Groundwater Area. Projected and anticipated

increases in that population in the future will continue to require water from those wells and such others as may be necessary to be obtained in that and other areas hereafter.

VI.

Most of the water produced and distributed for domestic and other municipal purposes by Tucson's water utility is obtained from wells located in and near the valley of the Santa Cruz River within the watershed of that river and downstream from the lands owned and occupied by FICO and the Mining Companies and downstream from the points at which either FICO or any of the Mining Companies will or can return used water to the watershed or the underground water system from which Tucson, FICO and the Mining Companies draw.

VII.

All of the parties hereto, specifically

including FICO, all of the Mining Companies and Tucson, have withdrawn water from the underground water supply within the Sahuarita-Continental Critical Groundwater Area, moved the water off the lands from which it was withdrawn and used the water on lands other than those from which it was withdrawn. All of those parties are continuing in that practice. All of them threaten, propose or plan hereafter to continue to do so. In the case of FICO, the water thus used has been both produced and used within the Sahuarita-Continental Critical Groundwater Area. In the case of the Mining Companies and Tucson, the water has been produced within that Area and transported and used outside it. The water produced by the Mining Companies has been used within the general Santa Cruz River watershed. The water produced by Tucson has been used within

that watershed.

VIII.

Tucson is and will hereafter be dependent, for water for domestic and other municipal purposes, on water from wells lying downstream of the lands of all of the defendants in Intervention. Water returned by defendants to the watershed of the Santa Cruz River and to the general groundwater system underlying the area of the river does and will mingle with the other percolating water from which Tucson's supply is for the most part drawn. Water drawn by all of the defendants in Intervention from the groundwaters of the Sahuarita-Continental Critical Groundwater Area is used by those defendants for agricultural, mining, milling and other purposes and is returned to the general groundwater system changed in quality by its uses so as to be undesirable for domestic

purposes and so as to render undesirable for such purposes all or a substantial part of the general supply of percolating water with which it is, after such return, comingled. The change in quality of the general supply threatens, if continued, to render undesirable for drinking and other domestic purposes the water which Tucson must draw from the Santa Cruz River Valley and its neighboring areas by wells presently in operation and others which in the future will be required to be put down.

WHEREFORE, The City of Tucson prays for judgment of the Court:

1. Declaring the rights of all of the parties herein to groundwaters of the Sahuarita-Continental Critical Groundwater Area; and declaring the conditions under which such waters may be withdrawn by the parties and the purposes for which it may be transported

and used by them.

2. Forever enjoining the defendants in Intervention, and any of them, from returning, or causing or permitting to be returned, used water to the general groundwater system underlying the area of the Santa Cruz River of such quality as to render undesirable for domestic purposes, now or hereafter, the general supply of groundwater with which the returned water becomes comingled, or as to threaten to do so.

(Signed HERBERT WILLIAMS, City Attorney of the City of Tucson, and LESHER & SCRUGGS, Special Counsel to the City of Tucson, by Robert O. Lesher, Attorneys for Plaintiff in Intervention)

* * *

(TITLE OF ACTION)

ANSWER OF DEFENDANTS ANACONDA COMPANY AND BOYD LAND AND CATTLE COMPANY TO THE CITY OF TUCSON'S COMPLAINT IN INTERVENTION

Filed: April 10, 1972

Defendants, The Anaconda Company and Boyd Land and Cattle Company, for their answer to plaintiff's complaint in intervention state:

I

These defendants affirmatively allege that the Boyd Land and Cattle Company is a wholly-owned subsidiary of the defendant, The Anaconda Company, and that all the acts and conduct of the Boyd Land and Cattle Company were done for and on behalf of The Anaconda Company as a wholly-owned and controlled subsidiary of the said Anaconda Company.

II

These defendants admit paragraphs I, II and III of the complaint.

III

In answer to paragraph IV these defendants admit the first two sentences thereof and deny the remaining allegations of paragraph IV.

IV

These defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs V and VI of the complaint.

V

In answer to paragraph VII, these defendants deny that they have withdrawn water from the underground water supply within the Sahuarita-Continental Critical Groundwater Area and moved this water off its lands. These defendants admit that they intend to continue to withdraw

and use water in the same manner that they have in the past. These defendants admit the City of Tucson has produced water within the area above-described and transported it for use outside the area. These defendants affirmatively allege that some water that The Anaconda Company uses in its mining operation is withdrawn from a point inside the Sahuarita-Continental Critical Groundwater Area and used at a point outside said area; that these defendants are without knowledge or information sufficient to form a belief as to the truth of the remaining allegations of paragraph VII of the complaint.

VI

In answer to paragraph VIII, these defendants are without knowledge or information sufficient to form a belief as to the allegations contained in the first sentence of paragraph VIII. These

defendants admit that water returned by The Anaconda Company to the watershed of the Santa Cruz River and to the general ground water system underlying the area of the river does and will mingle with other percolating water. These defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph VIII referring to the acts and conduct of other defendants. These defendants deny that The Anaconda Company will change the quality of water returned to the general ground water system in such a manner as to make it undesirable for domestic purposes so as to render undesirable for such purposes all or a substantial part of the general supply of percolating water which it has after such return commingled.

FIRST AFFIRMATIVE DEFENSE

These defendants allege that plaintiff

in intervention is entitled to no relief because it comes to a court of equity with unclean hands in that it now returns to the watershed of the Santa Cruz River and the general ground water system substantial quantities of sewage effluent which changes the quality of the percolating water in the general underground system.

SECOND AFFIRMATIVE DEFENSE

The claim of plaintiff is barred by laches in that defendant Anaconda Company has drilled and completed certain industrial wells and made substantial investments, believing in good faith it had a right to do so; that plaintiff in intervention has known of the activity of The Anaconda Company for some time and made no objection or complaint thereto and took no steps to prevent the conduct, but, in fact, encouraged such conduct.

THIRD AFFIRMATIVE DEFENSE

Defendants allege that defendants have purchased lands that were used for irrigation, all of which lay within the Sahuarita-Continental Critical Groundwater Area and retired these lands from cultivation and used the water previously used to cultivate said lands for The Anaconda Company's mining and milling operation and therefore The Anaconda Company has a vested right to use said water in the future.

FOURTH AFFIRMATIVE DEFENSE

That on or about the 21st day of December, 1948, pursuant to the authority vested in it by A.R.S. 45-303, the Arizona State Land Department designated certain land as the "Santa Cruz Groundwater Basin." All of the defendant Anaconda's facilities and activities are located within said Groundwater Basin and therefore no actionable wrong has

been committed by these defendants by the withdrawal and use of water in its mining operation or on any portion of land overlying the Groundwater Basin.

FIFTH AFFIRMATIVE DEFENSE

On or about the 8th day of June, 1954, pursuant to the authority vested in it by A.R.S. 45-303, the Arizona State Land Department designated certain land as the "Sahuarita-Continental Subdivision of the Santa Cruz Groundwater Basin." All of these defendants' pumping and use of water for its mining and milling operations are located within the boundaries of the Sahuarita-Continental Subdivision of the Santa Cruz Basin, and as a result thereof plaintiff has suffered no actionable injury as a result of any conduct of these defendants.

WHEREFORE, these defendants pray:

1. That plaintiff in intervention take nothing herein;

2. That this court enter its decree declaring that defendant Anaconda Company has the right to withdraw and use a sufficient amount of water from the Sahuarita-Continental Critical Groundwater Area for the purpose of operating its mine, mill, and related facilities, and

3. For these defendants' costs herein expended and for such other and further relief as is just and equitable.

(Signed CHANDLER, TULLAR, UDALL & RICHMOND by Thomas Chandler, Attorneys for named Defendants)

* * *

(TITLE OF ACTION)

ANSWER OF DUVAL DEFENDANTS TO THE CITY OF TUCSON'S COMPLAINT IN INTERVENTION

Filed: April 12, 1972

Defendants Duval Corporation and Duval Sierrita (hereinafter referred to

as "Duval" or "Duval Defendants") answer the Complaint in Intervention (hereafter called the "Complaint") of the City of Tucson (hereafter called "Tucson") as follows:

I.

Duval admits the allegations of Paragraphs I, II and III.

II.

Answering Paragraph IV, Duval admits that the mining companies are all corporations in possession of lands located west of the Santa Cruz River south of Tucson and within the watershed of the Santa Cruz River. Duval Sierrita tailing ponds are within the Critical Area and the Duval Esperanza pond, which is no longer in use, lies partly within the Critical Area. Duval Defendants believe the tailing ponds of the other Defendants also lie within the Critical Area. In addition to its well [illegible]cts,

its rights-of-way, leases and other lands for water storage and pipelines, its tailing ponds, and other small land parcels, Duval owns extensive agricultural acreage within the Critical Area which has been retired from cultivation. Duval believes the other mining companies also own substantial agricultural acreage within the Critical Area. All of the water produced by Duval is used within the Sahuarita-Continental Subdivision of the Santa Cruz Basin and all such water which is not actually consumed for industrial, mining and milling purposes is returned to the Critical Area.

III.

Answering Paragraph V, Duval admits that the City of Tucson obtains water from wells located near the Santa Cruz River, some of which are located within the Sahuarita-Continental Critical Groundwater Area and that water from

such wells has been used and transported to the area served by Tucson as a municipal water utility for several years. Duval lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations in Paragraph V.

IV.

Answering Paragraph VI, Duval admits that a large portion of the water produced and distributed for domestic and other municipal purposes by Tucson is obtained from wells located in and near the Santa Cruz River Valley, within the watershed of that River and northerly of the lands owned and occupied by FICO and the mining companies and northerly of the points at which either FICO or any of the mining companies are returning water to the watershed or to the groundwater supply of the Santa Cruz Basin.

V.

Answering Paragraph VII, Duval admits that it pumps water from wells located on its real estate within the Sahuarita-Continental Critical Groundwater Area and that it uses such water for its mining purposes on its real estate. Duval's uses of such water are entirely within the Sahuarita-Continental Sub-division of the Santa Cruz Basin and the return flow of all water which is not actually consumed for industrial, mining and milling purposes is to the Critical Area. Duval admits that some of the water pumped by FICO is used on lands other than those from which it is pumped. Duval admits that the City of Tucson has withdrawn water from the groundwater supply of the Sahuarita-Continental Critical Groundwater Area for sale and use on lands not owned by Tucson and lands other than those from

which said waters are pumped. Said lands lie outside the Sahuarita-Continental Subdivision of the Santa Cruz Basin, and there is no return flow of said waters to said Basin Subdivision. Duval admits that all parties plan to continue their present pumping practices.

VI.

Answering Paragraph VIII, Duval admits that water returned by Defendants to the watershed of the Santa Cruz River and to the general groundwater system underlying the area of the River does and will mingle with the other percolating water of the Santa Cruz Basin. Duval Defendants admit and allege that the water which FICO returns to the groundwater supply has rendered and will continue to render an adjacent portion of the groundwater supply of the Santa Cruz River Valley near Tucson undesirable and unfit for domestic purposes. Duval

Defendants lack knowledge or information sufficient to form a belief as to the allegation that the City of Tucson is and will hereafter be dependent on water from wells lying downstream of the lands of all of the Defendants in intervention.

VII.

Except as otherwise stated, Duval is without knowledge or information sufficient to form a belief as to the truth of the allegations regarding the other mining companies.

VIII.

Duval denies every allegation of the Complaint not herein admitted.

SEPARATE AND AFFIRMATIVE DEFENSES

I.

Tucson's Complaint fails to state a claim against Duval upon which relief can be granted.

II.

Duval alleges that Tucson is not

entitled to the equitable relief which it seeks, or to any relief from this Court, because Tucson is guilty of laches. Duval specifically alleges that Tucson, through its agents, has known of the uses and proposed uses made and to be made by Duval Defendants and other Defendants for many years. Tucson further knew that the water table of the Santa Cruz Basin had been lowering at all times since Tucson began pumping water, and further knew that Duval and other Defendants had invested or were in the process of investing and encouraged and induced Duval Defendants to invest many millions of dollars for mineral exploration and for plants, mills, properties and facilities for mining purposes. Nevertheless, in spite of its knowledge of such facts and in spite of its encouragement of Duval's mining activities, which make the assertion of its present

position unconscionable and inequitable, Tucson for many years has failed to take any action or steps to assert the rights it now claims.

III.

As to Defendant Duval Corporation, Tucson's claim is barred by limitations; specifically, among others, those set forth in A.R.S. Sec. 12-526.

IV.

Duval Defendants have a property right in the waters and to the reasonable use of waters of the Santa Cruz Basin which they are now using and exercising. Said right is secured and guaranteed by the law of Arizona, and to deprive Duval Defendants of said right or to deny their reasonable exercise of the same would deprive them of their property without due process of law, in contravention of Article 2 of the Constitution of Arizona and the 14th Amendment to the

Constitution of the United States, and would deny them the protection and equal protection to which they are entitled under said Article and Amendment.

V.

Tucson has been aware of the activities of Duval in connection with the development of its pits and mills, and for many years has been aware that Duval was making and continuing to make, and has encouraged and induced Duval to make, an investment in excess of $100,000,000.00 in connection therewith. Tucson nevertheless failed to make any such claim or assert any water rights against Duval. In reliance upon Tucson's conduct, Duval continued with the development of its pits and mills and the expenditure of millions of dollars incident thereto. Duval was misled by Tucson's silence and failure to assert its alleged rights. Duval would not have proceeded in the

manner which it did with said development and expenditure of money had Tucson given Duval timely notice of the claims or rights it now asserts. By reason of Tucson's conduct, which is inconsistent with the claims it is now making, and by reason of Duval's reasonable reliance upon such conduct and the enormous damage which will result to Duval if Tucson is permitted to repudiate its former conduct, Tucson is now estopped to assert the rights it now claims.

VI.

In addition to Duval's rights to reasonably use groundwater under the Arizona Groundwater Code and the Arizona reasonable use doctrine, Duval and its predecessors in interest have perfected a present right of appropriation from the under-flow of the Santa Cruz River which is paramount to any right Tucson may have. In addition, Duval has present

perfected water rights granted to its predecessors in interest by the King of Spain in the percolating groundwater of the Santa Cruz Basin and the subflow of the Santa Cruz River which rights are superior to any rights which the City of Tucson may have in the waters of the Santa Cruz Basin. Further, Duval has retired from cultivation substantial acreages of agricultural lands within the Critical Area and has thereby become equitably entitled to the beneficial application elsewhere of the water historically used on such lands.

WHEREFORE, Duval prays for judgment:

1. Confirming Duval's rights to the waters and the use of the waters of the Santa Cruz Basin which it has previously made, which it is now making and which it proposes reasonably to make hereafter.

2. For an order adjudicating the

relative rights of the parties hereto to the waters of said Basin Subdivision and the use of the same.

3. For Duval's costs.

4. For such further relief which seems equitable and proper to the Court.

(Signed FENNEMORE, CRAIG, von AMMON & UDALL by James W. Johnson for himself and Calvin H. Udall, Attorneys for named Defendants)

* * *

(TITLE OF ACTION)

COUNTERCLAIM OF THE ANACONDA COMPANY TO THE COMPLAINT IN INTERVENTION

Filed: September 25, 1973

The Anaconda Company, defendant in intervention (hereinafter defendant) through its attorneys, hereby files its counterclaim to the complaint in intervention submitted by the City of Tucson (hereinafter plaintiff). Defendant

alleges that:

I.

The plaintiff in this action is a corporation formed in accordance with Arizona Statutes as a charter city.

II.

The defendant is the owner of over 19,500 acres of land in Pima County, located in the Santa Cruz Valley south of the City of Tucson, which land is situated within the boundaries of and above the Sahuarita-Continental sub-division of the Santa Cruz groundwater basin.

III.

Defendant's lands have been developed over the course of the last decade into an open-pit copper mining operation. The percolating waters of said groundwater basin have been and will continue to be used on said lands.

IV.

The annual recharge of percolating

water into the groundwater basin from which defendant receives its supply for its mining operations is less than the amount of water which is being withdrawn from the basin. Portions of the groundwater basin in the area of defendant's lands were declared a "critical groundwater area" by the State Land Department on October 14, 1954 pursuant to A.R.S. Sec. 45-308.

V.

In recent years, plaintiff has acquired numerous well sites on land which overlies the Sahuarita-Continental subdivision of the Santa Cruz groundwater basin, in the critical groundwater area and in the area of defendant's lands. Plaintiff City is withdrawing substantial amounts of percolating water from such well sites, and is transporting it many miles for sale to its customers, and for use on lands other than those

from which they were taken and for use out of the groundwater basin from where the water is withdrawn to the great and irreparable injury of the defendant.

VI.

Plaintiff intends to continue the use of these percolating waters in the manner alleged above, and to increase such pumpage in the future substantially beyond the amounts now being used.

VII.

Defendant has been and will be irreparably injured and damaged by such withdrawal and transportation of the percolating groundwaters of the Sahuarita-Continental subdivision of the Santa Cruz groundwater basin.

WHEREFORE, defendant prays that this Court enter its order:

1. Enjoining the City of Tucson from further withdrawal and transportation of water from said wells;

2. That the defendant recover its costs in this action, and,

3. For such other relief as may seem appropriate, just and equitable in the premises.

(Signed CHANDLER, TULLAR, UDALL & RICHMOND, by Thomas Chandler, Attorneys for named Defendant)

* * *

(TITLE OF ACTION)

REPLY OF THE CITY OF TUCSON TO THE COUNTER-CLAIM OF THE ANACONDA COMPANY

Filed: October 2, 1973

The City of Tucson, Plaintiff in Intervention, replies to the Counterclaim of Anaconda Company as follows:

I.

It admits the allegations of Paragraphs 1, 2, 3 and 4.

II.

It admits the allegations of

Paragraphs 5 and 6, except that it specifically denies that its actions, either present or prospective, have damaged or will damage the Anaconda Company in any exercise of its lawful rights.

III.

As further and alternative defense, it avers that the counterclaim is barred by the running of the Statute of Limitations.

IV.

As a further and additional defense, it alleges that the withdrawal of water from wells lying within the area referred to in the counterclaim was begun many years ago; that the continued withdrawal of such water from such area and its transportation to the City of Tucson and its environ. for domestic and municipal purposes of the City of Tucson has been open and notorious; that it has been done with the full knowledge

and understanding of The Anaconda Company and its predecessors in title to the land and well sites which it owns in the area; that the City of Tucson has developed its water utility and the service which it provides to persons served by that utility, to the present number of more than 350,000, to a very large extent in dependence upon the water so withdrawn and transported, all of which has been open and obvious and fully known to the counterclaimant, The Anaconda Company, and to its predecessors in interest and title; that with this knowledge and knowing further that the City of Tucson required and depended upon such transported water, the counterclaimant, The Anaconda Company, and its predecessors in interest and title have from the beginning of such withdrawal and transportation and continuing for many years until the present acquiesced therein;

that it and they have made no protest to the City of Tucson about such withdrawal and transportation, but have instead stood by without complaint; that if the counterclaimant, The Anaconda Company, and/or its predecessor in interest and title had any legal rights against the City growing out of such withdrawal and transportation of the water referred to from the area referred to, it has waived such rights and has been guilty of such laches as now prevent its seeking the aid of the Court in this case.

(Signed HERBERT WILLIAMS, City Attorney of the City of Tucson, and LESHER & SCRUGGS, P.C., Special Counsel, by Robert O. Lesher, Attorneys for Plaintiff in Intervention)

* * *

(TITLE OF ACTION)

AMENDED REPLY OF THE
CITY OF TUCSON TO THE
COUNTERCLAIM OF THE
ANACONDA COMPANY

Filed: October 4, 1973

The City of Tucson, Plaintiff in Intervention, replies to the Counterclaim of The Anaconda Company as follows:

I.

It admits the allegations of Paragraphs 1, 2, 3 and 4.

II.

It admits the allegations of Paragraphs 5 and 6, except that it specifically denies that it has transported or is transporting the water outside of the groundwater basin from which it is withdrawn, and further specifically denies that its actions, either present or prospective, have damaged or will damage The

Anaconda Company in any exercise of its lawful rights.

III.

As a further and alternative defense, it avers that the Counterclaim is barred by the running of the Statute of Limitations.

IV.

As a further and additional defense, it alleges that the withdrawal of water from wells lying within the area referred to in the Counterclaim was begun many years ago; that the continued withdrawal of such water from such area and its transportation to the City of Tucson and its environs for domestic and municipal purposes of the City of Tucson has been open and notorious; that it has been done with the full knowledge and understanding of The Anaconda Company and its predecessors in title to the land and well sites which it owns in the area;

that the City of Tucson has developed its water utility and the service which it provides to persons served by that utility, to the present number of more than 350,000, to a very large extent in dependence upon the water so withdrawn and transported, all of which has been open and obvious and fully known to the counterclaimant, The Anaconda Company, and to its predecessors in interest and title; that with this knowledge and knowing further that the City of Tucson required and depended upon such transported water, the counterclaimant, The Anaconda Company, and its predecessors in interest and title have from the beginning of such withdrawal and transportation and continuing for many years until the present acquiesced therein; that it and they have made no protest to the City of Tucson about such withdrawal and transportation, but have

instead stood by without complaint; that if the counterclaimant, The Anaconda Company, and/or its predecessor in interest and title had any legal rights against the City growing out of such withdrawal and transportation of the water referred to from the area referred to, it has waived such rights and has been guilty of such laches as now prevent its seeking the aid of the Court in this case.

(Signed HERBERT WILLIAMS,
City Attorney of the City
of Tucson, and LESHER & SCRUGGS,
P.C., by Robert O. Lesher,
Attorneys for Plaintiff in
Intervention)

* * *

(TITLE OF ACTION)

COUNTERCLAIM OF DUVAL
DEFENDANTS AGAINST
PLAINTIFF IN INTERVENTION

Filed: November 7, 1973

Duval Corporation and Duval Sierrita Corporations (herein called "Duval Defendants") counterclaim against the City of Tucson (herein called "Tucson") as follows:

I

Tucson is a municipal corporation formed in accordance with Arizona Revised Statutes, Title 9, as a charter city.

II

Duval Defendants are corporations qualified to do business and doing business in the State of Arizona.

III

Duval Defendants are the owners or lessees of approximately 17,643 acres

of land located within the Sahuarita-Continental Subdivision of the Santa Cruz Groundwater Basin, so designated by the State Land Department by Order Number 14 on June 8, 1954, pursuant to Arizona Revised Statutes, Sec. 45-303, in Pima County, Arizona. Portions of Duval's lands in the Sahuarita-Continental Subdivision lie within the Sahuarita-Continental Critical Groundwater Area designated by the State Land Department on October 15, 1954, and have a history of and are now entitled to the use of percolating water underlying the Sahuarita-Continental Subdivision for agricultural purposes.

IV

Prior to the filing of Tucson's complaint in intervention, Duval Defendants pumped groundwater from beneath their lands located in the Sahuarita-Continental Subdivision. All

of the past, present and proposed uses of said waters by Duval Defendants are within the Sahuarita-Continental Subdivision on lands owned by Duval Defendants.

V

All of said waters pumped by Duval Defendants are put to reasonable and beneficial uses on lands owned by Duval Defendants in said Subdivision for industrial, mining, and milling purposes, and the return flow from said uses is to the common groundwater supply underlying the Sahuarita-Continental Subdivision.

VI

The supply of groundwater of said Subdivision is limited and for many years the water table within said Subdivision has been lowering and the supply diminishing. At all times material hereto, these facts have been well known to Tucson.

VII

Tucson pumps groundwater from the Sahuarita-Continental Subdivision of the Santa Cruz Groundwater Basin and transports such water outside of said Subdivision to points where its return to the common supply underlying said Subdivision is prevented. To the best information and belief of Duval Defendants, Tucson proposes to continue and to substantially increase the amount of the water it pumps and transports away from said Subdivision and common supply.

VIII

Such pumping and transportation by Tucson of water from the Sahuarita-Continental Subdivision is unreasonable and unlawful and has caused and will continue to cause irreparable harm to Duval Defendants in that they will be deprived of the reasonable, beneficial and lawful use of said waters from and

on their lands in said Subdivision, they will suffer great economic detriment, and their substantial investments in property rights will be destroyed unless this Court permanently enjoins Tucson from pumping and transporting said water away from said Subdivision and the common supply and otherwise using it in violation of the rights of Duval Defendants.

IX

The damage and detriment being caused Duval Defendants is irreparable and Duval Defendants have no adequate remedy at law.

WHEREFORE, Duval Defendants pray:

1. For an injunction permanently enjoining Tucson and its agents, servants or employees from transporting any water from the Sahuarita-Continental Subdivision of the Santa Cruz Groundwater Basin of Pima County and from otherwise using or transporting any water of said Subdivision in violation of the rights

of Duval Defendants; or in the alternative for an order permanently enjoining the City of Tucson from increasing the amounts of water it transports from said Subdivision and, or in the alternative, for damages in such amount as will adequately compensate Duval Defendants for the damage caused them by such past and future pumping and transportation of water by Tucson in violation of law and the rights of Duval Defendants;

2. For an order adjudicating the relative rights of the parties hereto to the waters of said Subdivision and the use of the same;

3. For their costs;

4. For such other and further relief as shall seem just and equitable to the Court.

(Signed FENNEMORE, CRAIG, von AMMON & UDALL by James W. Johnson, Attorneys for named Defendants)

* * *

(TITLE OF ACTION)

REPLY OF THE CITY OF TUCSON TO THE COUNTER-CLAIM OF DEFENDANT DUVAL

Filed: November 9, 1973

The City of Tucson, Plaintiff in Intervention, replies to the counterclaim of Defendants Duval as follows:

I.

It admits the allegations of Paragraphs I and II.

II.

It admits the allegations of Paragraph III.

III.

It admits that prior to the City's intervention in this action, Duval pumped groundwater from beneath its land located in the Sahuarita-Continental subdivision, and it denies every other allegation of Paragraphs IV and V.

IV.

It admits the allegations of Paragraphs VI and VII.

V.

It denies every other allegation of the counterclaim.

VI.

As a further and alternative defense, it avers that the counterclaim is barred by the running of the Statute of Limitations.

VII.

As a further and additional defense, it alleges that the withdrawal of water from wells lying within the area referred to in the counterclaim was begun many years ago; that the continued withdrawal of such water from such area and its transportation to the City of Tucson and its environs for domestic and municipal purposes of the City of Tucson has been open and notorious; that it has been

done with the full knowledge and understanding of the defendants Duval and their predecessors in title to the land and well sites which they own in the area; that the City of Tucson has developed its water utility and the service which it provides to persons served by that utility, to the present number of more than 350,000, to a very large extent in dependence upon the water so withdrawn and transported, all of which has been open and obvious and fully known to the counterclaimants, Duval Defendants, and to their predecessors in interest and title; that with this knowledge and knowing further that the City of Tucson required and depended upon such transported water, the counterclaimants, Duval Defendants, and their predecessors in interest and title have from the beginning of such withdrawal and transportation and continuing for

many years until the present acquiesced therein; that it and they have made no protest to the City of Tucson about such withdrawal and transportation, but have instead stood by without complaint; that if the counterclaimants, Duval Defendants, and/or their predecessor in interest and title had any legal rights against the City growing out of such withdrawal and transportation of the water referred to from the area referred to, they have waived such rights and have been guilty of such laches as now prevent their seeking the aid of the Court in this case.

(Signed HERBERT WILLIAMS, City Attorney of the City of Tucson, and LESHER & SCRUGGS, P.C., by Robert O. Lesher, Attorneys for Plaintiff in Intervention)

* * *

(TITLE OF ACTION)

DUVAL DEFENDANTS' MOTION
FOR SUMMARY JUDGMENT

Not file-stamped; dated February 12, 1974

DUVAL CORPORATION and DUVAL SIERRITA CORPORATION (herein called "Duval" or "Duval defendants") are defendants to a Complaint in Intervention filed by the City of Tucson, to which they have filed a Counterclaim.

Pursuant to Rule 56, A.R.C.P., Duval moves the Court for an order granting summary judgment in favor of Duval and against the City of Tucson, upon the grounds that the record before the Court, together with the Affidavits and Exhibits attached hereto and the Memorandum filed herewith show that there is no genuine issue as to any material fact, and that Duval defendants are

entitled to judgment as a matter of law.

This Motion is based upon the pleadings, depositions and Answers to Interrogatories on file herein, the Affidavits and Exhibits attached hereto and upon the Memorandum in Support of Motion for Summary Judgment which is filed herewith.

(Signed FENNEMORE, CRAIG, von AMMON & UDALL by Calvin H. Udall and James W. Johnson, Attorneys for named Defendants)

* * *

(TITLE OF ACTION)

DUVAL DEFENDANTS' MEMORANDUM
IN SUPPORT OF MOTION FOR
SUMMARY JUDGMENT

Not file-stamped; dated February 12, 1974

INTRODUCTION

The Motion of DUVAL CORPORATION and DUVAL SIERRITA CORPORATION (hereinafter called "Duval defendants" or "Duval")

is based on two legal theories.

1. The Critical Groundwater Area Theory. FARMERS INVESTMENT COMPANY ("FICO") has filed a Motion for Summary Judgment against Duval defendants. FICO asserts that Duval defendants are transporting water outside the Sahuarita-Continental Critical Groundwater Area. FICO also asserts that the transportation of water outside a critical area is a per se violation of the reasonable use doctrine as enunciated and applied in the Jarvis decisions.

Duval defendants strenuously challenge both of these assertions. But if the Court should sustain the contentions of FICO and reject those of Duval, then, a fortiori and as a matter of law, Duval defendants are entitled to summary judgment against the City of Tucson ("Tucson" or "City") on the same grounds.

2. The Reasonable Use Theory.

If, as it should, the Court denies FICO's Motion and the Motion of Duval defendants based on the critical groundwater area theory, Duval defendants are still entitled to summary judgment against Tucson as a matter of law.

Pursuant to the mandatory duty imposed upon it by statute, the State Land Department, by Order No. 14 on June 8, 1954, designated and established a groundwater subdivision called the "Sahuarita-Continental Subdivision of the Santa Cruz Basin". A "Groundwater Subdivision" is defined by statute as "an area of land overlying, as nearly as may be determined by known facts, a distinct body of groundwater. It may consist of any determinable part of a groundwater basin." (A.R.S. Sec. 45-301 6.).

Order No. 14 was not challenged,

as provided by statute. It is binding upon all of the parties to this action and is not open to collateral attack. This Order is binding upon all of the courts of this State and of the United States.

The north boundary of both the Subdivision and the Critical Area referred to above is a common one. No part of the corporate limits of the City of Tucson extends south of this boundary line. Tucson takes water from small parcels within the Subdivision and Critical Area, and exports this water for sale to others. The use or "beneficial use" of this water by any definition is outside the Subdivision and Critical Area, and it is a hydrological impossibility under the existing facts for any of such water to be returned to the common basin supply.

The City of Tucson admits that the groundwater supply of the Subdivision is

diminishing. Its transportation of water for sale and use outside the Subdivision violates the reasonable use doctrine. This violation is an invasion of the constitutionally protected property rights of Duval defendants and of all other persons lawfully and beneficially using groundwater in the Sahuarita-Continental Subdivision of the Santa Cruz Basin. Duval defendants are, therefore, entitled to summary judgment against Tucson, declaring Tucson's exportation and use of such water to be unlawful and enjoining it from such exportation of groundwater.

STATEMENT OF FACTS

As shown on the map which is Exhibit "A" hereto, the Sahuarita-Continental Critical Groundwater Area, south of Tucson, (the "Critical Area"),was so designated by the State Land Department

on October 14, 1954. It lies entirely within the larger Sahuarita-Continental Subdivision of the Santa Cruz Groundwater Basin (the "Subdivision"). A.R.S. Sec. 45-303 mandates that the Land Department "shall, from time to time as adequate factual data become available, designate groundwater basins and subdivisions..."

The Sahuarita-Continental Subdivision of the Santa Cruz Groundwater Basin was designated by the State Land Department by Order No. 14 on June 9, 1954. By statute, "'Groundwater Subdivision' means an area of land overlying as nearly as may be determined by known facts, a distinct body of groundwater. It may consist of any determinable part of the groundwater basin." A.R.S. Sec. 45-301 6.

A copy of Order No. 14 and the official map of the Sahuarita-Continental Subdivision, certified by Louis C.

Duncan, Deputy State Land Commissioner, is on file with the Arizona Supreme Court in Cause No. 10486 therein. Copies of said documents, certified by Clifford H. Ward, Clerk of the Arizona Supreme Court, are attached hereto as Exhibit "B".

The City of Tucson lies north of the Subdivision and the Critical Area. However, Tucson owns several well sites within the Critical Area and pumps such water primarily for use and sale outside of the Subdivision. Tucson owns no lands with a history of cultivation inside the Critical Area or Subdivision.

As appears from the Deposition (p. 52) of Frank Brooks, Assistant City Manager, taken in this lawsuit, such pumping by the City from the Subdivision may have commenced about 20 years ago. Since the beginning of 1964, the average rate of production from the City's wells inside the Critical Area and Subdivision

has doubled from an average daily rate of 9 million gallons to 18 million gallons (Brooks' Dep., pp. 52-54). Tucson admits that it intends to continue to increase these rates and to continue to transport such water away from the Subdivision.

Duval defendants own approximately 9,430 acres of land within the Subdivision, 7,430 acres of which are within the Critical Area. This land is used for industrial, agricultural, grazing and domestic purposes. Of such acreage, approximately 1,530 acres located on the Canoa Ranch and the recently acquired Esperanza Ranch, both inside the Critical Area, have a history of cultivation and are entitled to the use of water from the groundwater supply of the Subdivision. Duval is also engaged in mining an ore body lying partially within and partially to the west of the Subdivision. The ore is hauled by trucks to mills located

within the Subdivision. Industrial process water is pumped by Duval from wells located within the Subdivision and also within the Critical Area. The primary use of industrial water is to transport material within the mills and tailing material from the mills to tailing ponds located within the Critical Area. The ponds are the points of ultimate use of the tailing transportation water which is continuously pumped back and recycled.

A secondary and much smaller use consists of leaching water through stockpiled, low grade ore. Copper is extracted from the solution below the stockpile, and the water is recirculated. De minimis amounts of water are used in the mine and absorbed by the copper concentrates shipped from the mills. Makeup requirements for all of this industrial process water are about ~~17,000~~ 23,000 ROR acre-feet per annum.

For many years, the water table within the Subdivision has been declining and the supply diminishing. Duval filed its Answer to Tucson's Complaint in Intervention on April 12, 1972 praying for an adjudication of the relative rights of Duval and the City to the waters of the Subdivision. Duval filed its Counterclaim against the City on November 7, 1973.

ARGUMENT

1. FICO's Critical Groundwater Theory.

The first ground of Duval defendants' Motion for Summary Judgment against Tucson is conditional. Duval defendants rely on this ground only if the Court determines that FICO is entitled to summary judgment against them. For all of the reasons stated in Duval defendants' Response to FICO's Motion for Summary

Judgment, FICO is not entitled to summary judgment against Duval.

FICO's Motion for Summary Judgment against Duval claims that Duval is transporting water outside the Critical Area and that transportation outside a critical area is a per se violation of the reasonable use doctrine under the Jarvis decisions.[1/] With respect to FICO's Motion, Duval's position is that (1) the actual place of consumptive use by Duval is not outside but inside the Critical Area; and (2) even if FICO's allegations of fact were taken as true, neither the Jarvis decisions, the Groundwater Code, nor the reasonable use doctrine prohibit transportation of water outside a Critical Area. What they do prohibit is transportation of water away from the land

1/ Jarvis, et al. v. State Land Department, et al., 104 Ariz. 527, 456 P.2d 385 (1969); Jarvis, et al. v. State Land Department, et al., 106 Ariz. 506, 479 P.2d 169 (1970).

overlying the common groundwater supply, as defined by the State Land Department in designating the groundwater subdivisions which overlie "distinct bodies of groundwater" pursuant to A.R.S. Secs. 45-301 and 303. In fact, the Jarvis decisions, the Groundwater Code and the Reasonable Use Doctrine specifically permit transportation to other lands outside a critical area, so long as such lands also overlie the common supply. That the Continental-Sahuarita Subdivision overlies a "distinct body of groundwater" or a "common basin supply", both factually and legally, cannot be challenged.

However, if this Court finds that FICO is entitled to summary judgment against Duval on the grounds alleged in FICO's Motion, then those same grounds compel summary judgment against Tucson and in favor of Duval on its Counterclaim.

FICO's theory of the law is incorrect, but if such theory prevails, then judgment must be granted against the City in favor of Duval for the same reasons.

This is not to say that Duval is not entitled to summary judgment against the City or that it is not being damaged by the City's pumping. Duval is entitled to summary judgment. It is essential that Tucson's pumping be declared unlawful and enjoined to protect the rights of Duval to its lawful and reasonable industrial, agricultural, grazing and domestic uses of water, and also to protect the legal rights of other users in the Subdivision. The proper grounds for granting such relief, however, are not those advanced in FICO's motion against Duval but the grounds set forth in part 2 below.

Briefly, the facts which on FICO's theory of the law justify summary judgment against the City and in favor of

Duval are as follows:

Tucson is concentrating waters on several small well sites located inside the Critical Area and is transporting such water for use outside the Critical Area. In the last ten years, the rate of production by Tucson for use outside the Critical Area has increased from nine million gallons per day to more than eighteen million gallons per day (20,000 acre-feet per year). Tucson intends to continue to increase the rate of its pumping and exportation of this water. Duval owns approximately 7,500 acres of land within the Critical Area entitled to the beneficial use of ground-water underlying the Critical Area. Approximately 1,530 acres of such land with a long history of cultivation are entitled to the beneficial use of water for the cultivation of crops.

Further, under FICO's reasoning

Duval would be all the more entitled to judgment against Tucson than would FICO against Duval for the following reasons: (1) The water not actually consumptively used by Duval is returned to the Critical Area. Tucson admits that none of the water taken by it returns to the Critical Area (Tucson's Reply, par. IV); (2) Duval's wells are located on large tracts of land comprising hundreds of acres. Tucson's wells are located on small, "postage stamp sized" well sites; (3) Duval has temporarily retired hundreds of acres of land from cultivation which have a history of beneficial use for agriculture. Tucson owns no land with a history of cultivation in the Critical Area; (4) Duval's uses of water are entirely on land owned or leased by it for beneficial purposes. Tucson pumps water primarily for merchandising and sale to others.

Of course, Tucson cannot claim better water rights as a municipality than can ordinary private citizens and corporations such as Duval. In both Jarvis I and Jarvis II, supra, the Supreme Court specifically stated that Tucson enjoyed no better rights than private owners, and that Tucson could not continue to pump water in violation of the reasonable use doctrine without first having paid just compensation to the persons whose rights were invaded.

> "'There is no apparent reason for saying that, because defendant is a municipal corporation, seeking water for the inhabitants of a city, it may therefore do what a private owner of the land may not do. The city is a private owner of this land, and the furnishing of water to its inhabitants is its private business. It is imperative that the people of the city have water; it is not imperative that the city secure it at the expense of those owning lands adjoining lands owned by the city. (Citing case)'" Jarvis v. State Land Department (Jarvis II), 106 Ariz. 506, 479 P.2d 169, 172 (1970).

See also Jarvis v. State Land Department, (Jarvis I), 104 Ariz. 527, 531, 456 P.2d 385 (1969).

2. Violation of the Reasonable Use Doctrine.

Under the doctrine of reasonable use, water may be used off the land from which it is taken only when the rights of others are not injured. Fourzan v. Curtis, 43 Ariz. 140, 147, 29 P.2d 722 (1934); Jarvis II. As discussed below and in Duval's Response to FICO's Motion for Summary Judgment, the land from which the water is taken is the land which overlies the common basin supply. In this case, the land overlying the common supply has been officially defined by the State Land Department as the Sahuarita-Continental Subdivision of the Santa Cruz Groundwater Basin by its Order No. 14 entered June 8, 1954 pursuant to A.R.S. Sec. 45-303.

As stated in Bristor v. Cheatham, (Bristor II), 75 Ariz. 227, 237-38, 255 P.2d 173 (1953), two elements must be shown in order to make out a violation of the reasonable use doctrine: (1) that the water is not diverted for the "reasonable use of the land from which it is taken", and (2) resulting injury. As to the first element, Tucson has admitted that it is transporting water away from the Subdivision for use at points where its return to the Subdivision is prevented.

As to the second element, resulting injury, Tucson has admitted that the water supply of the Subdivision is limited, that it has been diminishing for many years, and that the water table of the Subdivisio. has been declining for many years. Tucson's continued pumping from the Subdivision and transportation of such water to points where it cannot

return to the Subdivision supply can only aggravate this overdraft situation and contribute to the damage of all lawful users within the Subdivision. Further, by designating a Critical Groundwater Area within the Subdivision, the State Land Department has made the additional determination that there is insufficient water available to sustain agriculture at the present rates of withdrawal. This determination, made on October 14, 1954, is binding on all of the parties, including Tucson.

Therefore, as was said in the Jarvis cases, further withdrawals from the common supply can only impair the rights and deplete the supply of existing users. In Jarvis, the second element--resulting injury--was presumed solely from the fact of the existence of a

designated Critical Area.[2/]

Both the elements necessary to show a violation of the reasonable use doctrine have been admitted by Tucson: (1) transportation away from the common basin (Subdivision) supply to points where return to the Subdivision supply is prevented; and (2) injury to the remaining owners overlying the common supply including Duval. Duval is accordingly entitled to an order prohibiting the City from pumping water from the Subdivision for use outside the Subdivision.

The doctrine of reasonable use was adopted by the Supreme Court of Arizona in Bristor v. Cheatham (Bristor II), 75 Ariz. 228, 240 P.2d 185 (1952). It

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2/ Contrary to FICO's position in this case, the Court did not presume the first element--failure to make a reasonable use on (sic) the land from which the water is taken--from the mere fact that transportation outside the Critical Area occurred. That issue turned on whether the water was used on land overlying the common basin supply.

was adopted in the following language:

> "This rule does not prevent the extraction of groundwater subjacent to the soil so long as it is taken in connection with the beneficial enjoyment of the land from which it is taken. If it is diverted for the purpose of making reasonable use of the land from which it is taken, there is no liability incurred to an adjoining owner for a resulting damage." (Emphasis added).

What is meant by "the land from which it is taken" can be determined from the dissents in the first Bristor opinion which Bristor II overruled. Justice LaPrade in his dissent in Bristor I stated the reasonable use issue as follows:

> ". . . whether the owner of land overlying a supply of percolating water common to adjoining land owners may pump the water from wells upon his land and convey it to other lands for the benefit of the latter from whence it does not return to replenish the common supply, if the supply available to the adjoining landowners from pumps upon their

lands drawing water therefrom is diminished to their injury." (Emphasis added) 73 Ariz. at 242.

Similarly, Justice DeConcini in his dissent from the first Bristor opinion, explained the doctrine of reasonable use as follows:

> "Under reasonable use there is . . . a prohibition upon a use on other land or at a distance away from the base of the common supply if such alien use interferes with the use of water of other property owners. (Emphasis added) 73 Ariz. at 255.

Thus, it is clear that it violates the doctrine of reasonable use to transport water away from the base of the common supply if its return to the common supply is prevented. That was the holding in the Jarvis decisions, particularly Jarvis II, and those decisions control here. In Jarvis II, the Court said:

> "The right to exhaust the common supply by transporting water for use off the lands

from which they are pumped is a rule of law controlled by the doctrine of reasonable use and protected by the constitution of the state as a right in property.

* * *

> "Tucson's delivery of water to purchasers within the Avra-Altar drainage area but outside the Marana Critical Groundwater Area is, however, without equitable sanction. There is no indication in the record that these customers of Tucson overlie the water basin so as to come within the principle applicable to Ryan Field. Until Tucson can establish that its customers outside the Marana Critical Groundwater Area but within the Avra-Altar Valleys' drainage areas overlie the water basin so as to be entitled to withdraw water from it, there are no equities which will relieve it of the injunction heretofore issued." (Emphasis added) 479 P.2d at 173.

The identical situation is present here. Tucson is transporting water away from the water basin which forms the common supply of the Subdivision. Such water is forever lost to the common supply.

In fact, as can be seen from many of the cases cited by the Arizona Supreme Court in the Jarvis decisions, the doctrine of reasonable use arose in exactly this context. Municipalities were installing wells on small parcels and transporting the groundwater pumped therefrom away from the base of the common supply for sale to the customers and for use at points where it would never return to the common basin. As was said in Canada v. City of Shawnee, 64 P.2d 694, 697 (Okla. 1936), rehearing denied (1937), "practically all of the cases in which this rule of . . . reasonable use has been applied were cases in which percolating water was being extracted from land for the purpose of sale at a distance, for use in supplying water to cities and towns. . . . "

For example, in Katz v. Walkinshaw,

70 Pac. 663 (Cal. 1902), on rehearing,

74 Pac. 766 (Cal. 1903), the court defined the land from which the water is taken as the "water-bearing land" (p. 771) and the "land overlying the water-bearing strata" (p. 772). It held the defendant could not divert "water for sale, to be used on the lands of others distant from the saturated belt from which the artesian water is derived" (emphasis added). (70 Pac. at 664). Likewise, in Burr v. Maclay Rancho Water Co., 98 Pac. 260, 264 (Cal. 1908), the court held that

> ". . . one cannot, to the injury of the other, take such waters from the strata and conduct the same to distant lands not situated over the same water-bearing strata." (Emphasis added)

Further,

> "The reasonable rule here would be to hold that defendants' appropriation for distant lands is subject to the reasonable

use of the water on lands overlying the supply. . . . "
(Emphasis added)

And in the following cases cities were enjoined from concentrating water on small well sites and transporting it away from the boundaries of the common supply:

Schenk v. City of Ann Arbor, 163 N.W. 109, 111 (Mich. 1917), (held unlawful ". . . to pipe the water away from the land, to sell some of it, to use some of it for municipal purposes, [and] not to return any of it to the land."); Volkmann v. City of Crosby, 120 N.W.2d 18, 22-23 (N.D. 1963), (water was ". . . piped to the city which is not located above the source of supply where it is used for municipal purposes and for sale to individuals. . . . " (emphasis added); Forbell v. City of New York, 58 N.E. 644, 645-46 (N.Y.

App. 1900), (city could not take water beyond the boundaries of the common supply". . . and by merchandising it, prevent its return. . . . "); Evans v. City of Seattle, 47 P.2d 984 (Wash. 1935), (the rule applies ". . . to the subject of water from a saturated stratum extending under the property of several owners,"; City of San Bernardino v. City of Riverside, 198 Pac. 784 (1921).

The facts necessary to show a violation of the reasonable use doctrine are undisputed: (1) Tucson is transporting water out of the Subdivision, which defines the "distinct body of groundwater" which is the common groundwater supply for Duval and others; and (2) the common basin supply of the Subdivision is now and since prior to 1954 being depleted; pumping by the City is contributing to that overdraft. Further, the water pumped by Tucson does

not return to the Subdivision; it is forever lost. Duval is entitled to judgment on its Counterclaim and to an order permanently enjoining Tucson, its agents, servants and employees from transporting any water from the Sahuarita-Continental Subdivision of the Santa Cruz Groundwater Basin of Pima County, Arizona.

(Signed FENNEMORE, CRAIG, von AMMON & UDALL by Calvin H. Udall and James W. Johnson, Attorneys for Duval Defendants)

Exhibit A to Motion for Summary Judgment, Map of Sahuarita-Continental Critical Groundwater Area and Subdivision, and

Exhibit B to Motion for Summary Judgment, Official Map of the State Land Department of the Sahuarita-Continental Subdivision of the Santa Cruz Basin as Established June 18, 1954, by Order No. 14, are incorporated by reference thereto under the provisions of Rule 3(b)7, Rules of the Supreme Court.

STATE OF ARIZONA)
) ss:
COUNTY OF MARICOPA)

I **Antonio Bucci** hereby certify:
Name

That I am **Reference Librarian, Law & Research Library Division** of the Arizona State
Title/Division

Library, Archives and Public Records of the State of Arizona;

That there is on file in said Agency the following:

Arizona Supreme Court, Civil Cases on microfilm, Film #36.1.764, Case #11439-2, Abstract of Record on Appeal, Volume I, pp. 1-79, page 728 and attachment (84 pages)

The reproduction(s) to which this affidavit is attached is/are a true and correct copy of the document(s) on file.

Antonio Bucci
Signature

Subscribed and sworn to before me this 12/15/05
Date

Etta Louise Muir
Signature, Notary Public

My commission expires 04/13/2009.
Date

Notary Public State of Arizona
Maricopa County
Etta Louise Muir
My Commission Expires
04/13/2009